Co., 189 N. Y. 532; *Virginia Fire & Marine Ins. Co.* v. *Richmond Mica Co.*, 102 Va. 429. The true theory of cases like the principal case should be that of estoppel, and waiver and estoppel seem to be exceedingly closely connected in such situations. It really amounts to fraud to accept a contract with full knowledge of the facts and later try to defeat it by setting up those facts. *Wood* v. *Ins. Co.*, supra. Under this principle there is no breach of the parol evidence rule. *Insurance Co.* v. *Wilkinson*, 13 Wall. 222. For a good comment on the *Northern Assur. Co.* case see *Virginia Fire and Marine Ins. Co.* v. *Richmond Mica Co.*, 102 Va. 429. So far as we have been able to ascertain the doctrine of the principal case as applied to conditions affecting the inception of the contract is in force only in Oklahoma, Massachusetts, and New Jersey. Rhode Island and Connecticut reach a similar result by different reasoning. *Liverpool & London & Globe Ins. Co.* v. *Richardson Lumber Co.*, 11 Okl. 585; *Sullivan* v. *Mercantile Town Mut. Ins. Co.*, 20 Okl. 460; *Oakes* v. *Ins. Co.*, 135 Mass. 248; *Dimick* v. *Met. Life Ins. Co.*, 69 N. J. L. 384, 62 L. R. A. 774; *Franklin Fire Ins. Co.* v. *Martin*, 40 N. J. L. 568; *Wilson* v. *Ins. Co.*, 4 R. I. 141; *Ryan* v. *Ins. Co.*, 41 Conn. 168. For a good case *contra* see *Medley* v. *German Alliance Ins. Co.*, 55 W. Va. 342.

If it is admitted, however, that the knowledge of the agent in the principal case related to a condition which would avoid the contract in the future only, the conclusion reached by the Court is probably sound, as the insured then had notice of agent's limited power and, as there was practically no evidence that the company did in fact permit parol waiver by its agents. *Insurance Co.* v. *Wolf*, 95 U. S. 326; *Insurance Co.* v. *Fletcher*, 117 U. S. 519; *Ripley* v. *Ins. Co.*, 30 N. Y. 136; *Phoenix Ins. Co.* v. *Moxson*, 42 Ill. App. 164; *Dulany* v. *Fidelity and Casualty Co.*, 106 Md. 17; *United Firemens' Ins .Co.* v. *Thomas*, 53 U. S. App. 517; *Northwestern Nat. Ins. Co.* v. *Mize*, (Tex. Civ. App.) 34 S. W 670 This is a logical view and is probably the basis of the decision in spite of the general language used.

For an admirable discussion of this subject along these lines with very complete citation of authorities see 4 COOLEY'S BRIEFS on the LAW OF INSURANCE, pp. 2459-2658; also VANCE, INSURANCE, pp. 355-385. As to election and not waiver being the true doctrine see 18 HARVARD L. REV. 364.

R. W. D.

THE RIGHT OF A TRUSTEE IN BANKRUPTCY TO SUE FOR INJURIES TO THE BANKRUPT'S PROPERTY.—It is provided by § 70 of the Act of 1898, that "The trustee of the estate of a bankrupt * * * shall be vested by operation of law with the title of the bankrupt to (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, * * * and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to his property." One of the principal difficulties under this provision is to determine what are injuries to property, within subdivision (6) supra. Although subdivision (5) is broad enough to include (6), it has not thrown much light upon the latter clause, since the test of assignability

of an action in most jurisdictions is, whether it be for an injury to property, as distinguished from an injury to the person.

Obviously state law is to govern in determining whether there has been "an unlawful taking or detention of, or injury to" a bankrupt's property; hence it is not surprising that there should be some apparent conflict in the decisions of the various districts.

The most recent case upon the subject is *In re Harper* (1910),—D. C., N. D. N. Y.,—175 Fed. 412. Here the Peninsular Paint & Varnish Company, of Detroit, Michigan, had sold a large quantity of paint to one Harper, of Troy, New York. Prior to Harper's being adjudged a bankrupt about one-third of the purchase price had been paid. The creditor then filed its claim in the bankruptcy court for the balance due. The bankrupt's trustee sought to set off a counterclaim for damages to the bankrupt's estate, resulting, it was claimed, from fraudulent statements by the vendor as to the quantity of business formerly done by the company in the bankrupt's territory, and failure to furnish an expert salesman as agreed. It was urged on behalf of the creditor that such a counter-claim, if proved to exist, was not an injury to the bankrupt's property, within subdivision (6) supra, and therefore did not pass to the trustee as assets of the estate. The presence of a state statute (Code Civ. Proc. N. Y. § 3343, subd. 10) expressly providing that "An injury to property is an actionable act whereby the estate of another is lessened, other than a personal injury, or the breach of a contract," and the decision of the state court (*Stewart* v. *Lyman,* 62 App. Div. 182, 185, 70 N. Y. Supp. 936), holding that an action for false representations in inducing the purchase of stock was an injury to property under § 3343 supra, relieved the court of the usual difficulty of passing upon the question as to what is an injury to property, since, as stated above, a state holding upon this point is binding upon the bankruptcy court.

Having determined that the right of action passed to the trustee, the court had further to determine whether it was such a "debt" as could be set off against the creditor's claim under § 68 of the Bankruptcy Act. Being an unliquidated tort, it is clear that it could not be set off by a creditor in an action brought against him by the trustee. Bankruptcy Act § 68 b, *Brown & Adams* v. *The United Button Company,* 149 Fed. 48, 79 C. C. A. 70. But § 68 applies only to the right of a creditor to set off demands against the estate, and does not limit the trustee's right to exercise this privilege against a creditor. Indeed, it is very improbable that the bankruptcy act contemplates a separate action in such cases, where the rights of the parties may easily be adjusted in the bankruptcy court. Nor does the enumeration of certain things that a debt shall *include,* in § 1, subd. 2, indicate that other things are *not* to be included. Accordingly, the court held that the counter-claim could properly be set off. It leaves the anomalous result, however, that a trustee can set off an unliquidated tort claim against a creditor, while a creditor cannot set off a like demand against a trustee.

The usual test of assignability is whether the right of action survives to the personal representatives. *Hedgerick* v. *Keddie,* 99 N. Y. 258; Case Note, 44 L. R. A. 177, and cases cited. In this connection, it is held practically

without dissent that injuries to the deceased's property survive, while those to his person are governed by the maxim, "Actio personalis moritur cum persona." 2 WILLIAMS, on EXECUTORS, 7th Am. Ed., p. 7. Since the same test ordinarily determines what passes to the trustee in bankruptcy, these cases are in point in determining what passes to the trustee under § 70.

Certain torts are clearly injuries to property, and as such would pass to an assignee or trustee anywhere. Thus the right of action has been held to pass in the case of conversion. *Burns* v. *O'Gorman Co.*, 17 Am. B. R. 815, 150 Fed. 226.

It is equally clear that other torts are personal and would not pass. Thus it has been held that a right of action for personal injuries resulting from negligence was personal and remained in the bankrupt. COLLIER, BANKRUPTCY, Ed. 7, p. 830, and cases cited. Of course it is competent for the legislature to change this rule. *Francis* v. *Burnett*, 84 Ky. 23. There is a middle class of cases, however, that gives rise to considerable difficulty. Rights of action for malicious prosecution are usually held to pass. *Cleveland Coal Co.* v. *Sloan*, 90 Ky. 308, 14 S. W. 279; but see *contra, In re Haensell*, 91 Fed. 355. In accordance with *In re Harper*, supra, it is usually held that an action for fraud and deceit passes, but see *contra, In re Crockett*, Fed. Cas. 3402. The question has also arisen where part of the injury is to the person and part to property. Here it is held that if the injury to the estate is merely incidental the right of action remains in the bankrupt. *Rose* v. *Buckett*, [1901], 2 K. B. D. 449; *In re Haensell*, supra. What would be the result where the injury to both is substantial and it is held that such is only one cause of action, and as such cannot be "split" under the usual Code provisions, seems not to have been decided.

Another phase of the subject has developed in connection with corporations. Obviously a corporation can receive no purely personal injury, and if slander and libel and the like are held to be so far personal in nature that they do not pass to the trustee, these torts seem likely to go unpunished. *Hansen Mercantile Co.* v. *Wyman*, 105 Minn. 491, 117 N. W. 926, 21 L. R. A. (N. S.) 727, and note. L. M. G.